BRIEF [1]

Summary of Argument.

I.

Mrs. Boyd gave her life interest to petitioner only on condition that petitioner would forthwith place it in a trust, the terms of which had been dictated by Mrs. Boyd. Accordingly, as long as the source of income is Mrs. Boyd's life interest, Mrs. Boyd is the real grantor, and petitioner was merely her agent in setting up the trust. The decision below conflicts with

Buhl v. *Kavanaugh*, 118 F. (2d) 315 (C. C. A. 6);
Lehman v. *Commissioner*, 109 F. (2d) 99 (C. C. A. 2);
Commissioner v. *Warner*, May 2, 1942 (C. C. A. 9);
Minnesota Tea Co. v. *Helvering*, 302 U. S. 609;
Helvering v. *Ala. Asphaltic Limestone Co.*, — U. S. — (Feb. 2, 1942).

II.

The meaning of a trust instrument should be determined from the intent of the signer as demonstrated by the evidence—including all the provisions of the trust instrument and other competent evidence. The trial tribunal, in making its findings, in effect found the intent of the trust instrument. There was substantial evidence to sustain this finding. The court below erred in upsetting the finding of the Board of Tax Appeals. Its decision conflicts with *Wilmington Trust Co., Exr. of Ortiz*, v. *Helvering*, — U. S. — (April 27, 1942).

III.

If the court below had compared the phraseology of the trust instrument with that of the statute, it would have

[1] For simplicity a single case is discussed, as in the statement, p. 5 above.

seen that the *accumulated income* could not have been distributed to petitioner, that no part of the *corpus* from which the accumulated income was derived could have been distributed to petitioner, and accordingly that no part of the accumulated income was taxable to petitioner.

IV.

The court below recognized that the trust was not a device for tax evasion. Accordingly the principle of *Helvering* v. *Clifford*[2] is not applicable.

ARGUMENT.

I.

Mrs. Boyd, Not Petitioner, Was the Real Grantor of the Trust So Far As Income Received During Her Life Is Concerned.

Mrs. Boyd had a life interest in 500 shares of Journal stock (R. 8, 50, 51). She desired to make provision for the financial welfare of petitioner (her daughter) and petitioner's children (R. 9, 43). She considered making a trust of her life interest in some of the Journal stock for her daughter and grandchildren and desired petitioner to make a similar trust of her remainder interest (R. 43, 44). On advice of counsel the procedure was simplified. Mrs. Boyd gave her life interest in 166 shares of Journal stock to petitioner *on condition* that petitioner would forthwith execute a deed of trust which had been prepared in accordance with Mrs. Boyd's ideas by Mrs. Boyd's counsel. By the trust instrument petitioner then conveyed the whole interest (Mrs. Boyd's life interest and petitioner's remainder) in the 166 shares to the trustee (R. 9, 44, 45).

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[2] 309 U. S. 331.

Mrs. Boyd is still alive. She testified in this proceeding (R. 41). Accordingly the income of the trust for the taxable years 1934-1936 was derived from Mrs. Boyd's contribution to the trust corpus. Mrs. Boyd would have received that income if she had not given her life interest to petitioner for the purpose of creating the trust. If she had created a separate trust of her life interest, she certainly would have been the grantor thereof, even if petitioner had simultaneously created a trust of the remainder.

> "A given result at the end of a straight path is not made a different result because reached by following a devious path."[3]

Mrs. Boyd was the real grantor of the trust so far as income during her life is concerned. Petitioner was merely her mother's agent in creating the trust as to her mother's life interest. If she had refused to execute the trust instrument, Mrs. Boyd could have compelled specific performance of her agreement or could have recaptured the life interest.

If petitioner should now seek to revoke the trust, Mrs. Boyd could undoubtedly restrain her.

Not being the real grantor petitioner was not liable for tax on the accumulated trust income, under Section 166 or 167. As to the distributed income, petitioner received that *as beneficiary* and reported it with her other income under Section 162(b) of the Revenue Acts.[4]

Petitioner raised this point before the Board of Tax Appeals, and before the Circuit Court of Appeals. The Board of Tax Appeals made the findings of fact requested by the petitioner in connection with this contention, but found it unnecessary to pass upon the issue, since it was deciding

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[3] *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613.

[4] Section 162 is quoted on p. 4 above.

in favor of petitioner on the broader ground that the trust did not come within Section 166 or 167 of the Revenue Acts.

The Circuit Court of Appeals gave scant consideration to this issue, dismissing it with the words:

> "Argument is made on behalf of the taxpayers that their mother, who thought up and arranged for the plan of the trust settlement, and not themselves, was the real grantor. We do not believe this to be true in fact or law.[5] The mother gave to the daughters, her agents, her life interest which was subject to being divested if the mother chose to sell these shares[6] or any other asset of the decedent's estate which was in her hands. But she did not do so. Instead she, in effect, offered to give to the daughters her interest in certain of the shares if they, in turn, agreed to dispose of the shares in a certain way. This they did. It is no less their act because they and their children benefited thereby. The mother was free to grant or not to grant; they were free to accept her offer or not to do so. We hold the transaction to be just what it was on its face, a deed in trust by the daughters to the trustee."

The reasoning of the Circuit Court of Appeals is directly in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Buhl* v. *Kavanaugh*, 118 F. (2d) 315 (1941). There A had created a trust for B. He had the right to terminate it and let B get the corpus. He had no power to recapture the corpus himself. He offered to terminate on condition that B would forthwith create a new trust pre-

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[5] The Board, not the court, should have judged this fact—see discussion below of *Wilmington Trust Co.* (*Ortiz Est.*) v. *Helvering*, p. 17.

[6] The court seems to have thought that Mrs. Boyd would have been divested of her life interest by selling any of the Journal stock, in the sense that her interest would have passed to her daughters. On the contrary she had specific authority to sell the fee of any asset. It was the daughters' remainder interest that would have been divested if the mother had sold an asset. If Mrs. Boyd had remarried she would have lost a life interest in ⅔ but would have gained a fee in the other ⅓. See Mr. Boyd's will and decree thereon, R. 50, 52. Mrs. Boyd never remarried.

pared according to A's wishes. B agreed and it was so consummated. *Held* that A and not B was the grantor. A did not even own the property at the time of the transaction, as did Mrs. Boyd in our case. Our case is accordingly stronger for looking behind the form to the substance of the transaction than the Sixth Circuit case. The conflict is clear.

In *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, the corporation claimed to have distributed moneys to its stockholders. They had agreed to pay certain debts of the corporation. This Court held that, to the extent that the debts were paid by the stockholders, there had been no distribution of assets to them but a discharge of the corporate debts. The reasoning is obviously irreconcilable with that of the Circuit Court of Appeals in the case at bar. The separate steps were integrated parts of a single scheme as in *Helvering* v. *Alabama Asphaltic Limestone Co.*, — U. S. — (Feb. 2, 1942). In that case this Court upheld the taxpayer against the claim of the government that the form of the several steps should control over the substance of the whole plan.

In *Lehman* v. *Commissioner*, 109 F. (2d) 99 (cert. den. 310 U. S. 637), two brothers made similar trusts for each other's benefit. The Second Circuit Court of Appeals looked through the form to the substance of the transaction and quoted from Scott on Trusts (§ 156.3):

> "A person who furnishes consideration for the creation of a trust is the settlor, even though in form the trust is created by another."

This reasoning is directly in conflict with that of the Third Circuit Court of Appeals in our case.

Similarly the decision in the present case conflicts with that of the Ninth Circuit Court of Appeals in *Commissioner*

v. *Warner,* — F. (2d) — (May 2, 1942). That was a case similar to the *Lehman* case. The court said:

> "Having thus furnished the consideration for the transfer of Albert's property to the trustees of trust B, Jack obviously was the donor of that property."

II.

The Court Below Usurped the Fact Finding Function of the Board of Tax Appeals.

The reasoning of the Circuit Court of Appeals, on the issue as to the applicability of Sections 166 and 167 of the Revenue Acts, is that the trustee had discretion to turn over corpus to the petitioner whenever needed for her "benefit" and that this word is so broad in meaning that—

> "The trustee certainly does have, under section 10 of the trust instrument * * * discretion almost without limit, to distribute the accumulations to the grantors." (R. 57.)

The court ignored the fact that the word "benefit" was used in conjunction with, and in the midst of other words, and that the rule of *noscitur a sociis* would naturally apply. What the trust instrument says is—

> "for the support, maintenance, benefit and/or education."

We take it to be well settled that:

> "If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible

because of the Statute of Frauds, the parol evidence rule, or some other rule of law."[7]

Also:

"The phrase 'terms of the trust' means the manifestation of the intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings."[8]

This is not a litigation between parties to a written instrument, so of course the parol evidence rule has no application.

The essential question is the meaning of the word "benefit" in Section 10 of the trust indenture. And the meaning of that word, like the meaning of any provision of the instrument, or the meaning of the whole instrument is something to be determined in the light of the *intention of the settlor.*

The intention of the settlor is essentially a question of fact.

The Board of Tax Appeals made a finding of fact that:

"At no time from the creation of the trusts to the end of the year 1936 has the income of the petitioners, by distributions of income from the trusts and from other sources, been insufficient to properly provide for her support, maintenance, benefit and/or education, or for that of her dependents."

Implicit in this finding is an interpretation of the word "benefit" for the Board must have had a meaning for it in mind in order to make the finding. So the Board's finding reflects its conclusion as to the settlor's intention.

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[7] Restatement of the Law. Trusts, Vol. 1, p. 404.

[8] *Ibid.* Vol. 2, p. 984.

The Circuit Court of Appeals not only, in effect, overruled a finding of fact of the Board but it ignored the well settled rule that an instrument must be construed in the light of its entire content.

Here we have a *spendthrift trust,* created, if not *by* at least *at the behest* of Mrs. Boyd, who wanted to protect her daughter from possible want in the future.

Sections 9(a) and 9(b) of the trust indenture (R. 11, R. 24) specifically prohibit anticipation. *What good would such provisions do if the entire corpus could be handed to the petitioner at any time, as the Circuit Court of Appeals would have it?*

Settlor, by signing an instrument prepared by her mother's counsel in the light of her mother's instructions, must have adopted the construction intended by her mother. The mother's whole purpose was to prevent what the court below says was permissible under the deed of trust.

Mr. Evans was responsible for the relief clause—Section 10. He was trust officer of the trustee corporation. He put that clause into numerous trusts—and knew how the trustees understood it (R. 48-49). His idea of the meaning of the words used was undoubtedly Mrs. Boyd's idea—and petitioner's. So there was substantial evidence for the Board's finding which the Circuit Court of Appeals in effect overrules.

This puts the Circuit Court of Appeals decision in direct conflict with the decision of this Court in *Wilmington Trust Company, Executor of Ortiz* v. *Helvering,* — U. S. — (April 27, 1942).

The Board's decision, in our case, of necessity, involved a determination that the settlor had not reserved an unlimited right to revoke the trust and vest in herself the

property that her mother had given on the express condition that it be subjected to an irrevocable spendthrift trust. That question, like the question in the *Ortiz Estate* case, was one of fact, for the Board. The fact, in our case, being the intent of the settlor, the Board's finding that "Each trust is irrevocable" (R. 10) here is parallel with the Board's finding that the sales in the *Ortiz Estate* case were not short sales.

The Circuit Court of Appeals committed the same error here that it did in the *Ortiz* case.

III.

The Court Below Erred in Failing to Check the Terms of the Trust Agreement With the Phraseology of the Revenue Act.

The trust income is divided into parts (a) for "Journal stock accumulation" under Section 1 of the trust agreement (R. 17-19), and (b) for distribution to beneficiaries. The petitioner not yet having set aside any shares for her children, under Section 4 (R. 19) the entire *distributive* income has gone to petitioner and has been reported as income by her. The dispute is entirely as to the income accumulated under Section 1.

In every year one-third of the total income exceeded $20,000 (R. 46, 47), so the provision of Section 1a (R. 18) limiting the accumulation to one-third of the income was always operative. So the income was divided into two parts: A—one-third—accumulated, and B—two-thirds—paid to petitioner.

Was any part of the A income within the provisions of Section 166 or 167 even if the Circuit Court has correctly construed the word "benefit"?

Let us parallel the provisions of the trust agreement with those of the statute, emphasizing the limiting phraseology:

If * * * the income of any beneficiary * * * should be insufficient to properly provide for the support * * * of such beneficiary * * * Trustee is authorized * * * to pay over unto * * * such beneficiary so much of the principal of any part or the whole of the trust fund **from which such beneficiary may then be receiving the income or the benefit thereof,** as may from time to time be required to make up such insufficiency of income.

Sec. 166.

"Where * * * power to revest in the grantor **title to any part of the corpus** of the trust is vested * * * then **the income of such part** of the trust shall be included in computing the net income of the grantor.

Sec. 167.

"(a) Where **any part** of the income of a trust—

(1) is or * * * may be held or accumulated for future distribution to the grantor; or

(2) may * * * be distributed to the grantor * * * then **such part** of the income of the trust shall be included in computing the net income of the grantor.

Even if the trustee decided that petitioner's income from all sources in any year was insufficient for her "benefit", it would not be permitted to give her any of the A income. Its power would be to give her part of the corpus then producing the B income—i.e., *the trust fund from which such beneficiary may then be receiving the income.*

Since the trustee could not give petitioner any part of the A income, which had to be accumulated until the fund amounted to $1,000,000 or the Journal stock was all sold—neither of which events has occurred—the provisions of Section 167 could not apply (the accumulation all being for the benefit of unascertained persons with contingent interests).[9]

[9] See section 161(a), p. — *supra.*

Also, since the trustee could not give petitioner any part of the corpus which was producing the A income—being allowed to give her only corpus from which she was then receiving the income—Section 166 has no application. For it only provides for taxing to the grantor the income of *that part of the corpus which could be handed to the grantor.*

The Circuit Court of Appeals certainly erred in not comparing the terms of the trust agreement with those of the statute.

IV.

The case does not fall under Helvering v. Clifford.[10]

The court below recognized that the transaction was for a legitimate object and not for tax evasion (R. 58, 59).

The petition should be granted.

Respectfully submitted,

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June, 1942.

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[10] 309 U. S. 331.